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No. _____

In the Supreme Court of the United States

OCTOBER TERM, 1982

OREGON DEPARTMENT OF REVENUE,
Petitioner,

v.

PACIFIC FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of Oregon

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QUESTIONS PRESENTED

1. Are federal savings and loan associations, chartered by the Federal Government under 12 U.S.C. § 1464, entitled to the protection of the Federal Government's immunity from taxation by the States?

2. Does the Tenth Amendment to the United States Constitution bar Congress from exercising its Commerce Clause power to prohibit the States from imposing nondiscriminatory and fairly apportioned taxes on corporations doing business within their borders?

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OPINIONS BELOW

Petitioner, the Oregon Department of Revenue, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Oregon, entered in this proceeding on May 19, 1982.

The opinion of the Oregon Tax Court which held that Congress' enactment of Public Law 93-100, 87 Stat. 347 (1973) was within Congress' authority to regulate interstate commerce (Appendix A) is reported, officially only, at 8 Or. Tax Rep. 466 (1980). The opinion of the Supreme Court of the State of Oregon, affirming the judgment of the Oregon Tax Court (Appendix B), is reported at 293 Or. 138, 645 P.2d 27 (1982).

JURISDICTION

The judgment of the Supreme Court of the State of Oregon was entered on May 19, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article I, Section 8, Clauses 3 and 18:

> "Congress shall have Power * * *
> "* * * * *
> "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;
> "* * * * *

"To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

United States Constitution, Amendment X:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Public Law 93-100, 87 Stat. 347, Section 7(c):

"With respect to any taxable year or other taxable period beginning on or after the date of enactment of this section and before January 1, 1976, no State or policital subdivision thereof may impose any tax measured by income or receipts or any other 'doing business' tax on any insured depository not having its principal office within such State."

STATEMENT OF THE CASE

Respondent is a federally chartered savings and loan association which has its principal office in Tacoma, Washington, and which maintains four branch offices within the State of Oregon.[1] In the tax year 1974, respondent was subject to the Oregon Corporation Income Tax Act of 1955, which imposed a tax upon corporate "net income derived from sources within [Oregon] other than income for which the corporation is subject to the tax imposed by the [Oregon corporation excise tax law] according to or measured

[1]The historic and procedural facts are not disputed and are taken from the opinions of the Oregon Tax Court and Oregon Supreme Court.

by its net income." Under this taxation system, the income attributable to sources within Oregon was determined under the Uniform Division of Income for Tax Purposes Act (codified at Or. Rev. Stat. § 314.605 *et seq.*).

Congress approved Public Law 93-100 on August 16, 1973, giving the Act an effective date of September 15, 1973. The Act prohibited any state or its political subdivisions from imposing any "doing business" tax or any tax measured by income or receipts on federally insured depositories which had their principal offices in another state. The federal Act initially barred state taxation until January 1, 1976; the bar was extended to September 12, 1976, by Public Law 94-222, 90 Stat. 197.

In its Oregon income tax return for tax year 1974, respondent stated, "In accordance with Public Law 93-100, the company has no taxable income in the State of Oregon." Petitioner Oregon Department of Revenue (Department) took the position that Public Law 93-100 exceeded the authority of Congress. It therefore assessed a tax deficiency against respondent, and issued an order to enforce the Oregon tax.

Respondent appealed the Department's order to the Oregon Tax Court. Respondent conceded that the Oregon tax was nondiscriminatory and relied primarily on the exemption conferred upon it by Public Law 93-100. The Tax Court suggested that federal savings and loan

associations are not constitutionally immune from state taxation as "federal instrumentalities," noting that it was "impressed by Justice Thurgood Marshall's dissent in *Agric. Nat. Bank v. Tax Commission,* 392 U.S. 339, 88 S. Ct. 2173, 20 L. Ed. 2d 1138 (1968), in which he wrote that the fact that institutions owe their existence to (are chartered by) the federal government must be rejected as a basis for tax immunity at the state and local level." *Pacific First Federal Savings and Loan Association v. Department of Revenue,* 8 Or. Tax Rep. 466, 471-72 & n. 2 (1980). The Tax Court held, however, that the congressional bar to income-based state taxation of federal thrift institutions was authorized by the Commerce Clause, and, due to its limited temporal and economic impact on the State of Oregon, did not breach limitations imposed by the Tenth Amendment. *Id.,* at 473-75.

On direct appeal to the Oregon Supreme Court the court did not address the question whether federally chartered thrift institutions enjoy governmental immunity from state taxation, although the issue was raised and briefed by the parties. Petitioner stated in its reply brief:

> "[A]s a matter of law and to the public seeking financial services, the distinction between federally and state chartered banks or savings and loan associations is lost." [App. Reply Br. at 2].
>
> "Plaintiff's reliance on the doctrine of immunity of federal instrumentalities is reliance on a

corpse without breath. If it is considered, it should be struck down." [App. Reply Br. at 5].

Examining the congressional bar to state taxation in light of this Court's recent discussions of the relationship between Congress' commerce powers and the sovereign perogatives reserved to the States by the Tenth Amendment,[2] the Oregon Supreme Court held that this Court's Tenth Amendment decisions had no bearing on Congress' power to regulate interstate commerce by immunizing certain commercial entities from state taxation. *Pacific First Federal Savings & Loan v. Department of Revenue,* 293 Or. 138, 144, 645 P.2d 27 (1982). The court concluded that *National League of Cities v. Usery,* 426 U.S. 833 (1976), and its progeny applied only to instances in which the Federal Government attempts "to regulate the managerial and operational aspects of state government." Quoting its prior decision in *Smith Kline & French v. Tax Commission,* 241 Or. 50, 61 n. 2, 403 P.2d 375 (1965), the Oregon Court held "that the congressional power over the taxation of the revenues of interstate commerce is supreme." 293 Or. at 145.

REASONS FOR GRANTING THE WRIT

Federal Savings And Loan Associations Are Merely Private Business Enterprises Which Have Not, In

[2]United Transportation Union v. Long Island Rail Road Co., — U.S. —, 102 S. Ct. 1249 (1982); *Hodel v. Virginia Surface Mining & Reclamation Association,* 452 U.S. 264 (1981); *National League of Cities v. Usery,* 426 U.S. 833 (1976).

Character Or Operation, Been So Assimilated Into The Structure Or Operations Of The Federal Government That They Should Partake Of The Government's Constitutional Immunity From Taxation By The States.

The doctrine that instrumentalities of the Federal Government constitutionally are immune from state taxation was established in *McCulloch v. Maryland,* 4 Wheat. 316 (1819). In *McCulloch,* this Court struck down a Maryland tax upon the issuance of notes by the Second Bank of the United States. The Second National Bank, was truly a "national" bank. It issued currency, accepted as legal tender for all debts owed to the Government; it administered the Government's foreign exchange transactions; and the Secretary of the Treasury was required to deposit all federal funds in the Bank unless he could justify to Congress doing otherwise. *Agricultural National Bank v. Tax Commission,* 329 U.S. 339, 355 (Marshall, J. dissenting).

Despite the uniquely governmental character of the bank which was protected from state taxation in *McCulloch,* the doctrine of tax immunity of federal instrumentalities has been extended to protect federally chartered entities which bear only a tangential relationship to the integral operations of the Federal Government. *See Agricultural National Bank, supra,* at 354-55. Such immunity apparently has been invoked as a bulwark in upholding congressional acts limiting the exposure of banking institutions to local

taxation. *See Federal Land Bank v. Bismark Lumber Co.*, 314 U.S. 85, 102 (1941); *Pittman v. Home Owners' Loan Corp.*, 308 U.S. 21, 29-30 (1939).

As pointed out in Mr. Justice Marshall's dissent in *Agricultural National Bank*, modern banking institutions no longer perform significant fiscal services which are integral to the Federal Government. *Id.*, at 356-58. Today's federally chartered thrift institutions bear little resemblance to the Second National Bank considered by this Court in *McCulloch*. In fact, such modern institutions have far more in common with state-chartered corporations than with their federally chartered forebears. Like stockbrokers, bonding companies, law firms and building contractors, they operate to produce private profit by providing needed services. This Court has never modified its application of the *McCulloch* tax immunity to account for the gradual but dramatic changes in the role and the nature of the banking industry. It should take this occasion to do so. Because state taxation of these organizations would not fall upon an "instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities," *United States v. New Mexico*, — U.S. —, 102 S. Ct. 1373, 1382 (1982), constitutional immunity from state taxation should be denied.

Furthermore, a major impetus which induced the Court in *McCulloch v. Maryland* to immunize the

National Bank from state taxation was the fact that the Federal Government and its instrumentality had no political power in the state which would tax it, and therefore no means of checking oppressive local taxation. *Id.*, 4 Wheat. at 435. Federal thrift institutions are not saddled with this disability. No less than their taxable state counterparts, federal savings and loan associations exercise political force in the states where they conduct business. In fact, due to the facility with which state savings and loan associations may transfer to federal status, many federally chartered institutions are former state entities. *See Hopkins Savings Assn. v. Cleary*, 296 U.S. 314 (1935). Their stockholders remain part of the local polity. Therefore, so long as federal thrift institutions are free from state taxation which favors state over federal institutions, the two kinds of organizations have a commonality of interest against oppressive state taxation which results in sufficient political clout to warrant suspension of the federal immunity. *See United States v. County of Fresno*, 429 U.S. 452, 458-63 (1977).

Because federal savings and loan associations are not arms of the Federal Government, and possess sufficient local political power to counter the imposition of oppressive state exactions, their constitutional immunity from state taxation should be reexamined.

By Directing The States To Suspend The Exercise Of Their Power To Tax Entities Doing Business Within

Their Borders, Congress Has Impermissibly Displaced The States' Traditional Powers To Establish A System Of Taxation Under Which All Who Benefit From State Government Pay The Costs Of Maintaining That Government And Its Services.

Public Law 93-100 prohibited the States from imposing any tax measured by income upon a federally insured depository which did business in the taxing state, but which had its principal office in another state. If, as discussed above, such depositories are not covered by the Federal Government's immunity from state taxation, only the congressional Act would exempt the respondent from the taxes which Oregon seeks to impose. The States' general power to tax persons and businesses within their respective borders extends to interstate commercial activities so long as the tax is nondiscriminatory, is not unduly burdensome, and is fairly apportioned and fairly related to the services provided by the state. *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274, 279 (1977). The Oregon tax here at issue satisfies these criteria.

The exemption from state taxation which Congress purported to confer in Public Law 93-100 was not designed to effectuate the restrictions on state taxing authority contained in the Commerce Clause itself. Rather, it was intended to prohibit otherwise legitimate state taxes in order to benefit a specific element of commerce. The Tenth Amendment stands as a substantive bar to Congress' exercise of its otherwise

plenary power under the Commerce Clause. The Amendment embodies the dual sovereignty which underlies our federal system. Congress cannot divest the States of the fundamental aspects of their separate sovereignty through its power to regulate interstate commerce. *National League of Cities v. Usery, supra.*

Public Law 93-100 touches the very heart of a state's governmental power. By regulating and limiting the States' taxing authority, Congress fundamentally undermines the States' ability to constitute its government and to define its scope and reach. Just as surely as the power to tax is the power to destroy, the power to prohibit taxation is the power to abolish the government. Absent a compelling constitutional imperative, the Tenth Amendment should shield the States from such interference with their separate sovereign integrity. This Court's analysis of the Tenth Amendment compels such a conclusion.

In order to establish the invalidity of congressional commerce power legislation under the reasoning of *National League of Cities v. Usery, supra,* the challenged act must regulate the "States as States"; it must address matters which are attributes of state sovereignty; and state compliance with federal law must impair directly the States' ability "to structure integral operations in areas of traditional functions." *Hodel v. Virginia Surface Mining & Reclamation Assn., supra,* 101 S. Ct. at 2366. Public Law 93-100

expressly regulates the States "as States" — in their sovereign, governmental capacities. It provides that during the effective period of the Act "no State * * * may impose any tax measured by income * * *." Unquestionably, the power to tax those who enjoy the protections and services of state government is a traditional element of state sovereignty. *McCulloch v. Maryland, supra,* 4 Wheat. at 429. The determinative question, therefore, is whether the congressional bar to state taxation directly impairs the States' ability to structure integral operations in traditional functional areas.

Although the amount at issue in this case is only a few hundred thousand dollars, the decisive factor in determining whether Congress has impermissibly trenched upon state sovereignty is the character of the federal action, not its economic impact. *Hodel, supra,* 101 S. Ct. at 2368 n. 33. Public Law 93-100 clearly cuts more deeply into the muscle of fundamental state activity than the application of the Fair Labor Standards Act to state employees which was invalidated in *National League of Cities.* In *National League of Cities,* this Court held that the Tenth Amendment barred application of minimum wage laws to state employees because otherwise the States would have been required to restructure their pay scales and their established modes of delivering governmental services. *Id.,* 426 U.S. at 846-48. In this case, the congres-

sional bar to state taxation deprives the States of an anticipated source of revenue, and thereby economically requires the States either to readjust their integrated revenue systems to increase the burden on other taxpayers, or to sustain the loss. More importantly, however, it also effectively donates the services and protections offered by the state, which the state must necessarily afford to all, to a profit-making entity which is under no obligation to bear its fair share of the state's cost in providing these services. In effect, therefore, Congress has conscripted the free services of the state for the benefit of a commercial entity. Congress has affected the fundamental revenue generating perogative of the States in a manner which threatens their separate, independent existence in the federal system. *See National League of Cities, supra,* 426 U.S. at 851.

If outright congressional exemptions of businesses from state taxation, such as Public Law 93-100, are sustained, the economic survival of the States depends solely upon the whim of Congress. Given the breadth of commerce which Congress is authorized to regulate, *see Wickard v. Filburn,* 317 U.S. 111 (1942), virtually any industry, including those which dominate the economy of a given state, may be exempted from state and local exactions of any kind, thereby crippling that state's ability to secure the revenues which are necessary for it to act. If this function of the States is a

political question, solely committed to the halls of Congress, then the tension of dual sovereignty which structures the relationship between the Government and the States is a fiction, and the Tenth Amendment an empty promise.

CONCLUSION

The decision of the Oregon Supreme Court permits Congress to destroy the independent existence of the States by suspending their sovereign powers to tax and by conscripting state services for the benefit of commercial entities. For the reasons given above, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of the State of Oregon.

Respectively submitted,
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Appendix A

IN THE OREGON TAX COURT

PACIFIC FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION

v.

DEPARTMENT OF REVENUE

Plaintiff corporation appealed from defendant's order imposing corporation income taxes on plaintiff for 1974. Plaintiff has four offices in Oregon, with its principal office in Washington. Plaintiff based its appeal on Public Law 93-100. Defendant contended that Public Law 93-100 was an unconstitutional usurpation of Oregon's taxing authority.

Court held that the authority of Congress to enact a moratorium in order to develop a uniform taxing system of federal banks and financial institutions by the states came within the provisions of the Supremacy Clause (U.S. Const, art VI, cl 2). Conflicting state law must yield to federal statute; therefore, plaintiff not required to pay corporation income taxes for 1974.

Taxation—Income taxes—Residence of taxpayer; corporations

1. In the case of interstate financial corporations, income ascribable to Oregon is determined under the Uniform Division of Income for Tax Purposes Act. ORS 314.605 et seq.

Taxation—Income taxes—Income of agencies and instrumentalities of United States in general

2. The several states can impose taxes on a federal instrumentality as long as they act in a nondiscriminatory fashion.

Constitutional law—Distribution of governmental powers and functions—In general

3. The Supremacy Clause gives Congress the authority to impose a relatively brief moratorium on the collection of taxes from "insured depositories" in order to develop a uniform taxing system.

Constitutional law—Distribution of governmental powers and functions—In general

4. Conflicting state law and policy must yield to the federal statute and policy.

Submitted on stipulation, briefs and oral argument on January 25, 1980, in the courtroom of Oregon Tax Court, Salem.

Jeffrey E. Boly, Wood, Tatum, Mosser, Brooke & Holden, Portland, represented plaintiff.

G. F. Bartz, Assistant Attorney General, Department of Justice, Salem, represented defendant.

Decision for plaintiff rendered December 17, 1980.

Appeal pending.

CARLISLE B. ROBERTS, Judge.

The plaintiff has appealed from the defendant's Order No. I 79-40, dated July 13, 1979.

The facts have been stipulated. The plaintiff is a federal savings and loan association, chartered under the Homeowners' Loan Act of 1933 (12 USC, § 1461 et seq.), administered by the Homeowners' Loan Corporation. Plaintiff has its principal office in Tacoma, Washington, but also maintains four branch offices within the State of Oregon, located in Portland, Eugene, Springfield and Bend. Each branch is independent of the others, each reporting directly to the principal office.

[1.] For income tax years before, during and after the income tax year 1974, plaintiff was subject to the Corporation Income Tax Act of 1955 (ORS Chapter 318). A tax is imposed by that act upon the corporate "net income derived from sources within this state, other than income for which the corporation is subject to the tax imposed by the Corporation Excise Tax Law of 1929 (ORS Chapter 317) according to or measured by its net income." As in the case of other interstate financial corporations, the income ascribable to Oregon is determined under the Uniform Division of Income for Tax Purposes Act, ORS 314.605 et seq.

The plaintiff is an "insured depository" within the provisions of the Federal Savings and Loan Insurance Corporation Act (12 USC, §§ 1724-1730).

On August 16, 1973, effective 30 days thereafter, Congress approved Public Law 93-100. Section 7 thereof is pertinent to this suit. It reads as follows:

> "Sec. 7(a). This section may be cited as the 'State Taxation of Depositories Act'.
>
> "(b) The Congress finds that the national goals of fostering an efficient banking system and the free flow of commerce among the States will be furthered by clarifying the principles governing State taxation of interstate transactions of banks and other depositories. Application of taxes measured by income or receipts, or other 'doing business' taxes in States *other than the*

States in which depositories have their principal offices should be deferred until such time as uniform and equitable methods are developed for determining jurisdiction to tax and for dividing the tax base among States. (Emphasis supplied.)

"(c) With respect to any taxable year or other taxable period beginning on or after the date of enactment of this section [August 16, 1973] and before January 1, 1976, no State or political subdivision thereof may impose any tax measured by income or receipts or any other 'doing business' tax on any insured depository not having its principal office within such State."

In its income tax return for 1974, plaintiff had stated: "In accordance with Public Law 93-100, the company has no taxable income in the State of Oregon." Without setting out its legal reasoning, the defendant department's opinion concluded that the federal government exceeded its constitutional authority in enacting Public Law 93-100 and found it to be unconstitutional. The defendant department's order held that the plaintiff was liable for income taxes for that year in the sum of $242,394, plus interest.

The facts having been stipulated, the suit was submitted on briefs and exhibits and oral argument. The sole issue presented is: Does Congress have the constitutional authority to enact a statute which imposes a temporary moratorium on state income taxation of a federal savings and loan association (an "insured depository") which does not have its principal office within the taxing state?

Exhibits attached to the Plaintiff's Reply Brief (filed in this court on November 23, 1979), as to which the court takes judicial notice, give some insight into the reasons for passage by the U. S. Congress of Public Law 93-100, section 7(b). Taken in chronological order, the first is a report to the Committee on Banking, Housing and Urban Affairs, United States Senate, entitled "State and Local Taxation of Banks," a report prepared by the Board of Governors of the Federal

Reserve System, published in May 1971 (*see* App B, Pl Rep Br). A recommendation made by the Federal Reserve (page 4 of its report), relating to taxation by states other than the state of the principal office, seeks to limit the circumstances in which national banks and other depository institutions may be subject to state or local government taxes on or measured by net income, and to prescribe rules for such taxation. Apparently, one of the fears of the Federal Reserve Board was that the home state might be required to divide the tax base of its domiciliary banks with other states or, on the other hand, it might acquire jurisdiction over part of the tax base of nondomiciliary banks. As stated in the report:

> "With interstate division of the tax base, assurances are needed that the sum of the taxable base on which two or more States levy taxes will not exceed 100 percent of the actual base. But even where this limit is not exceeded, serious burdens may result when two or more States claiming jurisdiction to tax, for example, the same net income, use different rules for interstate division of the tax base and require different kinds of records and reports.
>
> "If interstate division of the taxable net income of banks were to conform closely to procedures currently applied to other businesses by most States, there would be—with present lending practices—comparatively little allocation or apportionment of the tax base to States other than the home State of the banks. However, if all restrictions on taxing out-of-State institutions were removed, States could be expected to modify their allocation procedures so as to apply their levies to an increasing proportion of the tax base of out-of-State banks. This could involve the introduction of new division-of-base measures tailored particularly to financial intermediaries."

The next item which explains the enactment of Public Law 93-100 is Senate Report (Banking, Housing and Urban Affairs Committee) No. 93-149, May 14, 1973 (App A, Pl Rep Br). It states (on page 2020):

> "Taxation of the transactions of out-of-State de-

positories raises a number of difficult legal questions as well as operating and administrative problems.

"If an individual State decides to impose a 'doing business' tax and other neighboring States do not, this will tend to cause lendable funds to dry up in the taxing State. There is also the danger in multi-State tax situations of a tax base exceeding 100%. But even where this limit is not exceeded, serious problems may result when two or more States claiming jurisdiction to tax use different rules and require different kinds of reports and records.

"The Committee believes that the Advisory Commission on Intergovernmental Relations is eminently qualified to assume this task [of study and preparation of recommendations to Congress] since the Commission members include Federal Executive and Legislative Branch representatives, State legislators and State and local executives."

The report quotes a letter from Rep. Ralph Turlington, Chairman, Government Operations Task Force, dated April 16, 1973, which includes the following:

"One further objective of the bill is to render an exemption to these institutions [federally insured depositories] from the payment of either a state income or franchise tax in a State, other than the State where its principal office is located, even though these same institutions are doing business, or earning income, in those States. While we oppose such favored treatment, we do feel that some ground rules dealing with apportionment of taxable financial institutions income between States is certainly worthy of development. In this regard, the Government Operations Task Force of the National Legislative Conference feels that *a brief moratorium on the interstate taxation of federally insured depositories is in order,* during which time a fair and equitable apportionment formula can be agreed upon. Because of the representation of the States on the Advisory Commission on Intergovernmental Relations, we feel that ACIR would be the proper institution to develop recommendations concerning equitable state taxation of out-of-state commercial banks, mutual savings banks, and savings and loan associations and other matters relating to the question of multi-states taxation. * * *" (Emphasis supplied.)

A study and report was made by the Advisory Commission on Intergovernmental Relations to the Committee on Banking, Housing and Urban Affairs, United States Senate, in May 1975 (supplemented September 1975), entitled "State and Local 'Doing Business' Taxes on Out-of-State Financial Depositories, Report of a Study in Public Law 93-100." Respecting Public Law 93-100, sec. 7, the ACIR stated at page 485 (App C, Pl Rep Br):

> "One of the most preemptive of approaches to the question of Federal intervention would be congressional action prohibiting taxation of depositories by any State other than the State of corporate domicile. * * *"

The next pages of the report refer to many complicating factors which must be considered if the moratorium were made permanent and then concludes (at 487):

> "* * * But it would require a degree of congressional intervention in State policies and fiscal claims which many States could be expected to oppose."

The ACIR gave no thought as to the congressional power to establish a moratorium but, after its report was received, the Congress did nothing more and allowed Public Law 93-100 to expire, pursuant to its own time limitation.

[2.] The several briefs presented to the court by counsel are evidence of assiduous study of the question presented, but no judicial decisions have been offered which are squarely in point with the issue; i.e., the constitutionality of the use of a moratorium within the facts of this suit. There is no question but that the Homeowners' Loan Corporation is a federal instrumentality[1] and that the federal savings and loan association is a "creature" of that corporation. The preponderance of the authority would indicate that it, too, is a "fed-

[1] *Laurens F.S. & L. v. South Carolina Tax Comm.*, 365 US 517, 81 S Ct 719, 5 L Ed2d 749 (1961); *Pittman v. Home Owners' Loan Corp. of Wash., D.C.*, 308 US 21, 60 S Ct 15, 84 L Ed 11 (1939).

eral instrumentality." (*See* Pl Supp Memo, filed 2-25-80, and cases cited therein.) However, the United States Supreme Court has made clear that the several states can impose taxes upon a federal instrumentality as long as they act in a nondiscriminatory fashion. *First Federal Savings & Loan v. Mass. Tax Comm'n*, 437 US 255, 98 S Ct 2333, 57 L Ed2d 187 (1978). Plaintiff agrees that the tax applied by ORS chapter 318 is nondiscriminatory.[2]

The recommendations to the Congress made by the Federal Reserve Board, and the reports of the congressional committees cited and quoted above, indicate that, at the time of their publication, an apparently bona fide question had been raised as to the possibility of discrimination by the states in the taxation of branches of federal savings and loan associations in a given state (the principal office of such "insured depository" being located in another state). Nothing has been brought to the court's attention that would suggest that this question was without foundation and was arbitrarily seized upon by the Congress to wrest taxing power from a sovereign state.

The question having been raised in the Congress, study thereof was required. Study takes time. The Congress could have allowed the continuation of the status quo while necessary study was being made. If it reasonably appeared, *ab initio*, that there was significant danger that improper impositions could be made by some state or states, affecting the flow of loan money from federal banking establishments, the Con-

[2]This court recognizes that federal savings and loan associations are privately owned corporations seeking private profit. They perform few, if any, functions which differ from the usual, regular performance and procedures of a state savings and loan association. The court is impressed by Justice Thurgood Marshall's dissent in *Agric. Nat. Bank v. Tax Commission*, 392 US 339, 88 S Ct 2173, 20 L Ed2d 1138 (1968), in which he wrote that the fact that institutions owe their existence to (are chartered by) the federal government must be rejected as a basis for tax immunity at the state and local level. The real issue, he observed, is that any tax imposed must be nondiscriminatory in its effect on all persons within the properly prescribed classification which is subjected to the tax.

gress could certainly follow its own judgment in determining that a relatively brief moratorium should be utilized, pending conclusion of studies. Nothing has been shown in this suit that Congress acted unfairly.

[3.] The authority of Congress to enact a moratorium under the facts set out above, relating to a class of federal banking institutions, denominated for convenience as "insured depositories," in order to develop a uniform and equitable taxing system, although temporarily detrimental to the revenues of a particular state, seems clearly to come within the provisions of the U. S. Const., art VI, cl 2:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

The Supremacy Clause appears to this date to contain more power than the Tenth Amendment. *M'Culloch v. Maryland,* 17 US (4 Wheat) 316, 4 L Ed 579 (1819), has not yet weathered away. John Marshall, C.J., stated therein:

> "This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent to have required to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist.
>
> "In discussing these questions, the conflicting powers of the general and state governments must be brought into view, and the supremacy of their respective laws, when they are in opposition, must be settled.
>
> "If any one proposition could command the universal assent of mankind, we might expect it would be this—that the government of the Union, though limited in its powers, is supreme within its sphere of action. * * *" (17 US (4 Wheat) 316, 405, 4 L Ed 579, 601 (1819).)

M'Culloch v. Maryland specifically established the power of the federal government to create such system of banks as might be found necessary for the administration of federal powers stated in the U. S. Constitution, although "banking" is not specifically referred to in that document.

[4.] Conflicting state law and policy must yield to the federal statute and policy. Although constant attacks have been made by the states (and must ever continue) in order to determine the extent or limitations of federal power, a nationally known commentator, Edward S. Corwin, has concluded:

> "But Congress is still able, by virtue of the necessary and proper and supremacy clauses in conjunction, to exempt instrumentalities of the National Government, or private gains therefrom, from State or local taxation; but any person, natural or corporate, claiming such an exemption must ordinarily be able to point to an explicit stipulation by Congress to that effect. Moreover, Congress is always free to waive such exemptions when it can do so without breach of contract, and any such waiver will generally be liberally construed by the Court in favor of the taxing authority." (Corwin, *The Constitution and What It Means Today* 227 (1973 ed).)

The Tenth Amendment, although subordinate to the Supremacy Clause, still has its uses, as is illustrated by *National League of Cities v. Usery,* 426 US 833, 96 S Ct 2465, 49 L Ed2d 245 (1976), but the issue involved in that case is in sharp contrast to the situation which confronts the court in the present suit.[3] It must constantly be held in mind that the issue before this court deals only with the congressional power to provide by statute a brief moratorium which

[3]In *Usery,* the U. S. Supreme Court found the federal Fair Labor Standards Act had been amended in 1974 to require all states and their political subdivisions to apply the Act's minimum wage and maximum hour provisions to almost all state and local government employees. This amendment was deemed to exceed the powers of Congress and was stricken. (The case is useful in illustrating the continuing problem of interpretation to which Chief Justice John Marshall alluded, as quoted on page 473 of this opinion. In contrast, *see* the recent decision in *Arizona Public Service Co. v. Snead,* 441 US 141, 99 S Ct 1629, 60 L Ed2d 106 (1979).)

affects a very limited number of federal savings and loan associations,[4] one of which is doing business in Oregon. The federal act does not seek to impose immediately upon the state some discriminatory tax which favors the federal tax system in comparison to the state's system. The act merely provides time to make inquiry into questions relating to the possibility of discrimination by states in the taxing of a federal instrumentality. So far as the record in this proceeding shows, the questions were relevant and bona fide.[5]

The court recognizes that a federal measure creating a moratorium is the exercise of a power which can easily be abused.[6] However, it is the duty of Congress to set policy and to enact statutes in support thereof. A moratorium, by its very nature, is in derogation of these requirements. A moratorium is a "freezing"; an inaction or a nonaction. But it has its uses and justification. Its use can be analogous to the "stay" of collection of taxes which can be issued in the discretion of the judge of this tax court, when a substantial public interest requires, pursuant to ORS 305.565. The moratorium was so used in Public Law 93-100, sec. 7(c).

The defendant erred in its determination that the federal Public Law 93-100, sec. 7, was unconstitutional. Its action was premature. Defendant's Order

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[4] *See* Pl Rep Br 10, quoting the ACIR report.

[5] The court does not overlook the revenue lost to the state during the moratorium ($242,394 in 1974). In Congress, such a sum is probably deemed insignificant. Even in Oregon, where parsimony in government is the rule, that sum represents only 0.0024 percent of the revenue received by the state under ORS chapter 318 in 1974 ($102, 338, 535). (Source: Dept. of Rev. Monthly Receipts and Distribution Reports to the Legislative Revenue Office.)

[6] *See* the history of federal Public Law 86-272 (72 Stat 555), limiting the states' nondiscriminatory income taxation of interstate corporations. This measure, enacted as a temporary statute on September 14, 1959, still continues in effect, pending further congressional action.

Consider also the tax and record-keeping problems engendered by two congressional postponements of "carry-over" bases under the federal inheritance tax laws for most property acquired from a decedent. IRC (1954), §§ 1016(c), 1040 and 2614(a). PL 96-223, § 401(a) (4-2-80); PL 94-455 (10-4-78).

I 79-40 must be set aside and held for naught. Plaintiff is not required to pay corporation income taxes to Oregon for the tax year 1974. Plaintiff is entitled to its statutory costs and disbursements.

IN THE SUPREME COURT OF THE
STATE OF OREGON

PACIFIC FIRST FEDERAL SAVINGS
AND LOAN ASSOCIATION,
Respondent,
v.
DEPARTMENT OF REVENUE,
Appellant.

(TC 1359, SC 27631)

Appeal from Oregon Tax Court.*

Carlisle B. Roberts, Judge.

Argued and submitted October 6, 1981.

Theodore W. de Looze, Chief Counsel, Tax Division, Salem, argued the cause for appellant. With him on the briefs was Dave Frohnmayer, Attorney General, Salem.

Jeffrey E. Boly, Portland, argued the cause and filed the brief for respondent.

William D. Dexter, General Counsel, Tumwater, Washington, filed the brief amicus curiae and argued the cause on rebuttal for Multistate Tax Commission.

Before Denecke, Chief Justice, and Lent, Linde, Peterson, Tanzer and Campbell, Justices.

DENECKE, C. J.

Affirmed.

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*8 OTR 466 (1980).

DENECKE, C. J.

The Oregon Department of Revenue seeks to have held unconstitutional an Act of Congress exempting the plaintiff taxpayer and other similar concerns from any "doing business" state tax, which would include the Oregon corporate excise tax. The Department contends the Act is beyond the powers granted to Congress.

The taxpayer is a savings and loan association chartered under the federal Homeowners' Loan Act of 1933 (12 USC 1461(h)). Its accounts are insured by the Federal Savings and Loan Insurance Corporation. The Association's principal office is in the State of Washington and it has four branch offices in Oregon. It filed a 1974 Oregon corporate excise tax return with the defendant stating that pursuant to Public Law 93-100, 87 Stat 347 (1973), it earned no taxable income in Oregon. The Department assessed a deficiency against the taxpayer and issued an order that Public Law 93-100 exceeded the authority of Congress. The taxpayer appealed to the Tax Court which upheld the Act. 8 OTR 466 (1980). We affirm.

Public Law 93-100 provided that Congress found, "* * * fostering an efficient banking system and the free flow of commerce among the State will be furthered by clarifying the principles governing State taxation of interstate transactions of banks and other depositories." For this reason it decided that "doing business" taxes imposed by states on depositories having their principal offices in other states should be deferred until equitable methods are developed to determine jurisdiction to tax. Congress, therefore, declared that for three years no state could impose a "doing business" tax "on any insured depository not having its principal office within such State." [1]

1

"(a) This section may be cited as the 'State Taxation of Depositories Act.'

"(b) The Congress finds that the national goals of fostering an efficient banking system and the free flow of commerce among the States will be furthered by clarifying the principles governing State taxation of interstate transactions of banks and other depositories. Application of taxes measured by income or receipts, or other 'doing business' taxes, in States other than the States in which depositories have their principal offices should be deferred until such time as uniform and equitable methods are developed for determining jurisdiction to tax and for dividing the tax base among States.

The taxpayer contends Congress was empowered to act either under its admitted power to exempt "federal instrumentalities" from state taxation *(M'Culloch v. Maryland,* 17 US 421 [4 Wheat 316] [1819]) or under its power "to regulate Commerce * * * among the several States * * *." Art I, § 8, Constitution of the United States. We hold Congress was empowered to act by the Commerce Clause.

The state and the Multistate Tax Commission, which supported the Department's position, make several arguments: The exemption is not a regulation of interstate commerce but if it should be so considered, the federal government's interest in preventing any possibility of a state interfering with interstate commerce is outweighed by the state's imperative need to tax; that if Congress did have a legitimate concern about the flow of interstate commerce, it was confined to national banks and not federally chartered savings and loan associations; a moratorium on state taxation is not a means "reasonably adapted" to the end permitted by the Constitution; that is, freeing the flow of commerce. *Heart of Atlanta Motel v. United States,* 379 US 241, 85 S Ct 348, 13 L Ed2d 258, 271 (1964).

We start with some basic concepts that are not disputed. The power of Congress delegated by the Commerce Clause is plenary; it is, "complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the constitution." *Gibbons v. Ogden,* 22 US (9 Wheat) 1 (1824). That power not only applies to persons or things in commerce but to "activities affecting commerce." *United States v. Darby,* 312 US 100, 61 S Ct 451, 85 L Ed 609, 185 ALR 1430 (1941); *Fry v. United States,* 421 US 542, 95 S Ct 1792, 44 L Ed2d 363 (1975). If Congress finds or states that a particular activity is in commerce or affects commerce, the courts must accept that determination if there is any rational basis for the

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"(c) With respect to any taxable year or other taxable period beginning on or after the date of enactment of this section and before January 1, 1976, no State or political subdivision thereof may impose any tax measure by income or receipts or any other 'doing business' tax on any insured depository not having its principal office within such State.

"* * * * *"

determination. *Katzenbach v. McClung*, 379 US 294, 85 S Ct 377, 13 L Ed2d 290, 297-298 (1964); *Hodel v. Virginia Surface Min. & Recl. Assn.*, ___ US ___, 101 S Ct ___, 69 L Ed2d 1, 15 (1981).

In the statute in issue, Congress stated: "[T]he free flow of commerce among the States will be furthered by clarifying the principles governing State taxation of interstate transactions of banks * * *." The legislative history of the statute here in question shows Congress's concern that state taxation could unduly interfere with the interstate commerce conducted by depositories, including savings and loan associations, as well as national banks. A report prepared by the Board of Governors of the Federal Reserve System entitled, "State and Local Taxation of Banks" (1971), states:

> "With interstate division of the tax base, assurances are needed that the sum of the taxable base on which two or more States levy taxes will not exceed 100 percent of the actual base. But even where this limit is not exceeded, serious burdens may result when two or more States claiming jurisdiction to tax, for example, the same net income, use different rules for interstate division of the tax base and require different kinds of records and reports."

Senate Report (Banking, Housing and Urban Affairs Committee) No. 93-149, May 14, 1973, quotes a letter from Rep. Ralph Turlington, Chairman, Government Operations Task Force, dated April 16, 1973, as follows:

> "* * * Because of the representation of the States on the Advisory Commission on Intergovernmental Relations, we feel that ACIR would be the proper institution to develop recommendations concerning equitable state taxation of out-of-state commercial banks, mutual savings banks, and savings and loan associations and other matters relating to the question of multi-states taxation. * * *."

We also conclude that there is a "rational basis" for Congress to believe that states' "doing business" taxes levied on concerns such as the plaintiff taxpayer are on activities in interstate commerce or activities affecting interstate commerce. The exemption only applies to the taxing of depositories which have their principal office in another state. It is rational to conclude that this spatial arrangement probably would involve or affect transactions and the flow of property across state lines.

The Department relies heavily upon *National League of Cities v. Usery*, 426 US 833, 96 S Ct 2465, 49 L Ed2d 245 (1976). This was the first decision in 40 years to hold a congressional regulation of commerce to be an invalid encroachment upon the sovereignty of state or local government. In *Usery*, the court held invalid amendments to the Fair Labor Standards Act which extended the minimum wage and maximum hours provision to employees of state and city government. The Court so held because of its conclusion that in fixing minimum wages and maximum hours for persons performing services the state and local governments traditionally provided, the federal government was interfering with " 'functions essential to separate and independent existence' " of the states and their subdivisions. 426 US at 845.

The reach of *National League of Cities* was uncertain. For examples, see Tribe, American Constitutional Law, § 5-22 (1978); Lockhart, Kamisar & Choper, Constitutional Law (5th ed 1980), 188, 191. Two recent United States Supreme Court cases now have outlined the perimeter of the principle of the *National League of Cities* opinion.

Hodel v. Virginia Surface Min. & Recl. Assn., supra, 69 L Ed2d 1, concerned the validity of the federal Surface Mining Control and Reclamation Act of 1977. The United States District court had relied upon *National League of Cities* and held the Surface Mining Act invalid because "it concluded that the Act contravenes the Tenth Amendment because it interferes with the States' 'traditional governmental function' of regulating land use." 69 L Ed2d at 21.

The Supreme Court held that in enacting the Act, Congress was validly acting within its power to regulate commerce. The Court stated the scope of *National League of Cities*.

> "It should be apparent from this discussion that in order to succeed, a claim that congressional commerce power legislation is invalid under the reasoning of National League of Cities must satisfy each of three requirements. First, there must be a showing that the challenged statute regulates the 'States as States.' Id., at 854, 49 L Ed

2d 245, 96 S Ct 2465. Second, the federal regulation must address matters that are indisputably 'attributes of state sovereignty.' Id., at 845, 49 L Ed 2d 245, 96 S Ct 2465. And third, it must be apparent that the States' compliance with the federal law would directly impair their ability 'to structure integral operations in areas of traditional functions.' Id., at 852, 49 L Ed 2d 245, 96 S Ct 2465. * * *." 69 L Ed2d at 21.

The *Surface Mining* law was held not within the ambit of *National League of Cities* because the law did not come within the first of the above-quoted requirements; that is, did not regulate the "States as States."

In the second Supreme Court case, the first requirement was satisfied, but the statute was nevertheless held valid. In *United Transportation Union, Petitioner v. Long Island Railroad Company* (slip op No. 80-1925, decided March 24, 1982), the issue was "* * * whether the Tenth Amendment prohibits application of the Railway Labor Act to a state-owned railroad engaged in interstate commerce." slip op p 1. The Court held: "It is thus clear that operation of a railroad engaged in interstate commerce is not an integral part of traditional state activities generally immune from federal regulation under National League of Cities." slip op at p 6.

These three cases, and the "three requirements" stated in *Hodel v. Virginia Surface Min. & Recl. Assn., supra,* we now understand to be applicable to situations in which the federal government, acting pursuant to the commerce power, is attempting to regulate the managerial and operational aspects of state government. In *Usery, supra,* it was the wages and hours of state employees; in *United Transportation Union, supra,* it was the labor relations of state employees; and in *Hodel, supra,* it was the regulation of private operators of strip mines. Presumably the principles of these cases would apply to the wages and hours and labor relations in state tax departments as well as in other traditional state government operations. But the power of Congress to regulate interstate commerce by immunizing some of it from state taxation raises entirely different issues. *Usery, Hodel* and *United Transportation Union* are not applicable to those issues.

More applicable is our decision in *Smith Kline & French v. Tax Com.*, 241 Or 50, 403 P2d 375 (1965). The predecessor of the Oregon Department of Revenue contended that a federal statute regulating the state's taxing the income of concerns conducting business involving interstate commerce was beyond Congress's power to regulate commerce. We held the act was valid the stated: "* * * [W]e are convinced * * * that the congressional power over the taxation of the revenues of interstate commerce is supreme." 241 Or at 61, n 2.

As regards the argument that the means adopted by Congress is not "reasonably adapted" to freeing the flow of commerce; providing for a tax moratorium while Congress seeks a solution to state taxation which impedes the flow of commerce is "reasonably adapted."

Affirmed.

FILED
SEP 20 1982
ALEXANDER L. STEVAS
CLERK

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1982

No. 82-286

OREGON DEPARTMENT OF REVENUE,

Petitioner,

v.

PACIFIC FIRST FEDERAL SAVINGS
AND LOAN ASSOCIATION,

Respondent.

BRIEF OF RESPONDENT PACIFIC FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Is certiorari appropriate to review a decision of the Oregon Supreme Court which:

(1) Is fully in accord with this Court's prior decisions regarding the power of Congress to exempt "federal instrumentalities" from state taxation;

(2) Is fully in accord with this Court's prior decisions regarding the Commerce Clause power of Congress to immunize some commerce from state taxation; and

(3) Does not involve an important question of federal law.

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STATEMENT OF THE CASE

Respondent believes that the following should be included in the Statement of the Case:

On the question of whether federally chartered thrift institutions can be exempted by Congress from state taxation, Respondent stated in its Brief before the Oregon Supreme Court:

> "Although the federal instrumentality doctrine originated in M'Culloch with a constitutional foundation, it is important to note that its assertion here is predicated upon a statute: 12 USCA 1464(h). As Justice Thurgood Marshall said in dissent in First Agricultural National Bank:
>
> > 'I have no doubt that Congress could provide (and has provided, see infra, at 362, 20 L Ed 2d 1152), statutory immunity from state taxation for the federal instrumentalities it may establish.' 392 US at 352. [Res. Br. at 7]

In its discussion of the Commerce Clause, the Oregon Supreme Court examined

the legislative history of Public Law 93-100 and concluded that there is a "rational basis" for Congress to find that the "doing business" tax in question affects interstate commerce. Pacific First Federal Savings & Loan v. Department of Revenue, 293 Or 138, 142, 645 P 2d 27 (1982). The Court held that providing for a tax moratorium while Congress seeks a permanent solution to state taxation which impedes the flow of commerce is a "reasonably adapted" response. 293 Or at 145.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

1. This Court should not reach the issue of the power of Congress to exempt "federal instrumentalities" from state taxation. If reached, this case would present a question of federal law which has already been settled by this Court.

The power of Congress to enact Public Law 93-100 is supported by both the

"federal instrumentalities" doctrine and the Commerce Clause. The Oregon Supreme Court based its holding on the Commerce Clause; therefore, the federal instrumentalities doctrine only becomes an issue if this Court holds that Congress was not empowered to act under the Commerce Clause.

Petitioner contends that this Court should take this occasion to reexamine the constitutional immunity of federal savings and loan associations from state taxation. Implicit in this request is the necessary recognition that this Court has previously granted such immunity. M'Culloch v. Maryland, 17 US 421, 4 Wheat 316, 4 L Ed 579 (1819) and Pittman v. Homeowners' Loan Corp. of Wash. D.C., 308 US 21, 84 L Ed 11, 60 S Ct 15 (1939). Therefore, the question is settled.

Petitioner's argument for reconsideration is based upon a misinterpretation of Justice Thurgood Marshall's dissent in First Agricultural National Bank v. State Tax Commission, 392 US 339, 355, 88 S Ct 2173, 20 L Ed 2d 1138 (1968).

It is true that this dissent criticizes the exemption of federal instrumentalities from state taxation as a matter of constitutional doctrine. However, in the process, Justice Marshall unequivocally states that Congress can provide statutory immunity from state taxation to federal instrumentalities and that 12 USC § 1464(h) confers federal instrumentality status upon federal savings and loan associations:

> "I have no doubt that Congress could provide (and has provided, see infra, at 362, 20 L Ed 2d 1152), statutory immunity from state taxation for the federal instrumentalities it may establish. 392 US at 352.

* * * *

"* * * the constitutional immunity of federal instrumentalities was just as plain when Congress provided statutory immunity for such agencies as, e.g., the Federal Reserve banks, 38 Stat 258 (1913), 12 USC §531; Federal land banks, 39 Stat 380 (1916), 12 USC §931; many other federal banking institutions;11 392 US at 362.

11. E.g., federal intermediate credit banks, 12 USC §1111; Federal Home Loan Bank, 12 USC §1433; federal savings and loan associations, 12 USC §1464(h)." 392 US at 362, n. 11 (emphasis added).

Thus, this dissent affirms the power of Congress to exempt federal instrumentalities (such as Respondent) from state taxation by statute (such as Public Law 93-100).

2. This Court has already held that Congress is empowered to regulate interstate commerce by immunizing some of it from state taxation.

Petitioner contends that National League of Cities v. Usery, 426 US 833, 96

S Ct 2465, 49 L Ed 2d 245, (1976) and its progeny such as Hodel v. Virginia Surface Mining & Reclamation Association, 452 US 264, 101 S Ct 2352, 69 L Ed 2d 1, (1981) have established a Tenth Amendment bar to Congress's exercise of its otherwise plenary power under the Commerce Clause. Petitioner argues that congressional limitations upon a state taxing power is even more destructive of a state's sovereignty than the attempt to regulate the management and operational aspects of state government which was involved in Usery and Hodel, supra. However, Petitioner misses the distinction which was so clearly stated by the Oregon Supreme Court. Precisely because Usery and Hodel, supra, only involve the regulation of managerial and operational aspects of state government they are not in point here where the issue is the power of Congress to regulate

interstate commerce by immunizing some of it from state taxation.

This Court has recently spoken regarding the power of Congress to regulate interstate commerce by restricting a state's taxing power. In Arizona Public Service Co. v. Snead, 441 US 141, 99 S Ct 1629, 60 L Ed 2d 106, 113, (1979), this Court held as follows:

> "The appellees also argue that if the federal statute is construed to invalidate the New Mexico tax, it exceeds the permissible bounds of congressional action under the Commerce Clause. In view of the broad power of Congress to regulate interstate commerce, this argument must be rejected. (citations omitted). Here, the Congress had a rational basis for finding that the New Mexico tax interfered with interstate commerce, and selected a reasonable method to eliminate that interference. The legislation thus was within the constitutional power of Congress to enact." (citations omitted).

This was a unanimous decision of the Court with a concurring opinion of Mr. Justice Rehnquist in which Mr. Justice White

joined. Therefore, the Tenth Amendment notwithstanding, this Court continues to hold that the power of Congress under the Commerce Clause is sufficiently broad to permit a federal statute to invalidate a state tax, provided a rational basis exists for finding that the tax interferes with interstate commerce and the method to eliminate that interference is reasonable.

Petitioner has not challenged the Oregon Supreme Court holding that Congress had a rational basis for finding that the doing business tax involved here affects interstate commerce and that the tax moratorium was a "reasonably adapted" response. Rather, Petitioner chose to base its petition upon the Usery line of cases. These cases are not apposite to the issue here.

The core of Petitioner's argument is that congressional power to exempt a

profit-making entity from state tax threatens the economic survival, indeed the very sovereignty of the states. The reach of the Commerce Clause is so extensive that the existence of the States will depend upon the whim of Congress. This reductio ad absurdum argument ignores the limitations imposed in the Snead, supra, case.

For Congress to act, not only must interstate commerce be involved but also Congress must select a response reasonably adapted to eliminate the interference. So it is with Public Law 93-100. This temporary moratorium has what Petitioner concedes is only a minor impact upon its revenue.

The case of State of Arizona v. Atchison, Topeka, and Santa Fe Railroad Company, 656 F 2d 398 (Ninth Circuit,

1981) is a recent example of the application of the Snead, supra, doctrine. There relying on Snead, supra, the Ninth Circuit rejected the State of Arizona's contention that the Tenth Amendment bars the Commerce Clause authority of Congress to regulate Arizona's power to tax property located entirely within its borders. Accordingly, when this Court decided Snead, supra, it resolved the issue of a Tenth Amendment limitation upon the Commerce Clause authority of Congress to regulate state taxation.

3. The decision of the Oregon Supreme Court at issue here does not involve an important question of federal law which should be decided by this Court.

The Oregon Supreme Court based its Commerce Clause holding on its own prior decision in Smith Kline & French v. Tax Commission, 241 Or 50, 403 P 2d 375

(1965) where it stated: "* * * [W]e are convinced * * * that the congressional power over the taxation of the revenues of interstate commerce is supreme." 241 Or at 61, n 2. Therefore, the issue presented by this Petition is well settled by State of Oregon law and does not present any important federal question which should be decided by this Court.

The tax moratorium at issue here only lasted three years. It expired six years ago on September 12, 1976. Respondent is not aware of any other case in the country which involves Public Law 93-100. In most jurisdictions the statute of limitations would bar tax litigation for 1976 or earlier years. Therefore, the only continuing consequences of Public Law 93-100 is a one-time minor revenue loss by the State of Oregon. The precious resources

of this Court should not be wasted on a case of such insignificance.

CONCLUSION

A Writ of Certiorari is not appropriate to review a decision of the Oregon Supreme Court which is fully in accord with this Court's prior decisions regarding federal instrumentalities and the Commerce Clause power of Congress to immunize some commerce from state taxation. Moreover, certiorari is inappropriate because this case does not involve an important question of federal law.

Respectfully submitted,

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